STATE OF CALIFORNIA GRAY DAVIS, *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 16, 2002

TO: PARTIES OF RECORD IN APPLICATION 02-04-049

Decision 02-12-024 was mailed on December 13, 2002, without the dissent of Commissioner Wood. Attached herewith is the dissent.

/s/ CAROL A. BROWN (By Kenneth Henderson)
Carol A. Brown, Interim, Chief
Administrative Law Judge

CAB:mnt

Attachment

A.02-04-049
D.02-12-024

DISSENTING OPINION OF COMMISSIONER CARL WOOD

I dissent from this decision, because this order violates the law. It is about the use of electric utility property for a purpose unrelated to electric service. Since the property is currently useful in the performance of its duties as a public utility, Southern California Edison cannot permanently encumber the property for other uses without receiving prior approval from the Commission under Section 851. That approval is discretionary. Where discretionary approval might have a significant impact on the environment, the California Environmental Quality Act springs into effect. In the absence of a specific statutory exemption, the Commission must complete any appropriate environmental analysis and consider potential environmental impacts prior to deciding whether or not to approve the request.

The Commission does not have a choice about whether or not to comply with CEQA. In fact, that is the whole point of the statutory scheme – to ensure that public entities do not make decisions affecting the environment without first understanding what those impacts may be. Yet, this order declares that the Commission does have such a choice, and that it is choosing not to comply with CEQA.

This majority opinion does not focus on the fact that this is discretionary decision about the use of electric utility property and becomes distracted by the fact that the secondary use relates to cellular telephone service, another utility service regulated by the Commission. It argues that since the Commission has a policy of deferring to local entities in approving the siting of cellular towers, it does not have to comply with CEQA with regard to these applications.

While it is true that the Commission does not perform environmental analysis when a local agency reviews a proposed cellular tower, in those circumstances, the Commission is not making a discretionary decision. But when an electric utility asks for permission to encumber is property, the Commission is making a discretionary decision. The Commission does not have the legal authority to waive CEQA analysis in such a situation, no matter what its policy preferences might be.

The problem is compounded because of the nature of Edison's request. It is seeking approval of Master Lease Agreements now, and it will decide where to allow the cellular providers to place equipment later. That means that Edison is

seeking a blank check and that the Commission is not only left unable to perform its responsibilities under CEQA, but is also unable to meaningfully assess the physical and economic implications of providing approval under Section 851.

We are faced with a regulatory square peg that we cannot fit into a legal round hole. To the extent that the world needs more cellular towers, it may make the most sense to site those towers in existing utility corridors. It certainly makes sense to make productive use of utility rights-of-way where those uses do not interfere with utility service and can provide additional ratepayer benefits. It may be too cumbersome to ask electric utilities to seek specific approval each time a cellular provider wants to site new equipment. However, our statutory responsibilities to protect the environment and oversee the use of utility property are clear. We may need legislative intervention, here, in the form of a statutory CEQA exemption, or a modification of our responsibilities under Section 851. The challenges are real. However, what we do not of the luxury of doing is taking the law into our own hands and declaring that we will ignore a statutory scheme that by its very nature is designed to protect the state and its citizens from abuse. This approach discredits the agency and provides opportunity for mischief. There is little comfort in the fact that there may not be a litigant ready to take us to court, this time.

/s/ **CARL W. WOOD**
Carl W. Wood
Commissioner

San Francisco, California
December 5, 2002